INDEX

CITATIONS

677336—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 328

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO AND LELIA F. CRAIGO, PARTNERS DOING BUSINESS AS WILSON LUMBER COMPANY, APPELLANTS

v.

OTHO A. COOK, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS

No. 329

OTHO A. COOK, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS, PETITIONER

v.

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO AND LELIA F. CRAIGO, PARTNERS DOING BUSINESS AS WILSON LUMBER COMPANY

ON APPEAL FROM AND ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

On October 8, 1945, in both of these cases the Court invited the Solicitor General to file a brief

as *amicus curiae*. (R. 42.) In No. 328 the Court requested counsel, without restricting their argument in any other respect, to address themselves in their briefs and on oral argument to four questions which relate to the record made below and the assignments of errors in this Court, and whether the constitutional objection to the tax in question has been preserved so as to be presented to this Court. (R. 42.) We believe that in this case those questions can best be developed by the parties and we wish to express no opinion upon them. Passing those questions, we assume that the Court has jurisdiction to decide the cases on their merits, and we desire to express our views on the issues inherent in the record. These may be stated as follows:

1. Whether the taxing statute is repugnant to the Constitution and laws of the United States in so far as it requires the severer of timber to collect the tax from the United States, or imposes a lien upon property of the United States.

2. Whether the portion of the national forest established by reservation of forest lands from the public domain is an area over which the United States has exclusive jurisdiction so as to exclude the operation of the taxing statute within its boundaries.

3. Whether the portion of the national forest established on land acquired by the United States is an area over which the United States has such jurisdiction.

STATUTES INVOLVED

These are set forth in the Appendix, *infra*, pp. 22–27.

SUMMARY OF ARGUMENT

I

1. The Arkansas severance tax statute is unconstitutional so far as it taxes the United States. The statute requires payment of the tax in the first instance from the person actually engaged in the operation of severing timber from the soil, but, in general terms and without excepting the United States, the statute requires the severer to collect or withhold the amount of the tax from the price paid to the owner of the timber at the time of severance. If the statute left the severer ultimately liable for the tax, the tax would not be objectionable for it is now well settled that a contractor with the United States does not share its sovereign immunity, and a state tax is not violative of federal supremacy unless by legal incidence the tax is upon the sovereign itself, its property or activities. But established principles preclude the states, without the consent of Congress, from exacting taxes from the United States. A statute which imposes the ultimate liability for a tax upon the United States where Congress has not subjected the federal activity to state taxation is as invalid as a statute exacting the tax from the United States directly.

The statute is unconstitutional so far as it purports to impose a lien upon federal property. By the contract here involved, the United States retains title to severed timber until paid for, scaled, measured or counted. The state cannot constitutionally impose a lien, without the consent of Congress, upon this or any other federal property.

2. However, it is wholly possible that the Supreme Court of Arkansas might construe the foregoing provisions (withholding, lien, etc.) as inapplicable when the United States is the owner, thus leaving a valid tax against the severer. Alternatively, it might construe the state statute as separable, so that even if the foregoing provisions were otherwise applicable and unconstitutional, a valid tax would remain against the severer. Whether the Arkansas court would place such interpretations upon the statute is conjectural and we express no opinion on the matter.

II

The severance tax is not objectionable on the ground that the United States has exclusive legislative jurisdiction over any part of the national forest. Such jurisdiction can be acquired by the United States in either of two ways: Through a cession of jurisdiction to the United States by the state, or by the federal purchase of lands within a state and with its consent for needful buildings pursuant to Article I, Section 8, Clause 17 of the

Constitution. Whichever method is involved, the United States may accept or decline the grant, and acceptance will not be presumed where Congress has shown its disinclination to receive exclusive legislative powers over the area in question.

1. So far as any area now in the national forest was originally part of the public lands of the United States, the legislative authority of Arkansas extended over that area upon the admission of Arkansas to statehood, subject only to the provision that the state could not enact laws in conflict with the exercise of the powers granted to the Federal Government by the Constitution. Since these lands were always owned by the United States and were never purchased by it, the constitutional provision in Article I, Section 8, Clause 17 can never have come into operation to divest the state's authority. The state has not ceded legislative authority to the United States, and there is no defect in the state's authority to tax transactions otherwise within its reach in such areas.

2. As to lands which were purchased by the United States for inclusion in the national forest, such purchases were made with the statutory consent of Arkansas. The statute giving consent reserves only the right of the state in civil matters to execute its process, and the court below erred in holding that this reservation preserved the state's power to tax. Other reasons, however,

preclude the divestment of the state's jurisdiction. Apart from the question whether the purchases were for "needful buildings" within Article I, Section 8, Clause 17 of the Constitution, exclusive legislative jurisdiction did not follow, because Congress has expressly provided that the legislative jurisdiction of the state should not be changed by reason of the Government's acquisition of lands for national forests. The power of Congress to refuse exclusive jurisdiction is undoubted.

ARGUMENT

I

THE ARKANSAS SEVERANCE TAX STATUTE IS UNCONSTITUTIONAL SO FAR AS IT TAXES THE UNITED STATES OR SUBJECTS FEDERAL PROPERTY TO ITS LIEN

1. The Arkansas severance tax statute, Digest of the Statutes of Arkansas (Pope, 1937), Secs. 13371–13395, has several provisions which are unconstitutional if the statute is applied according to its terms and without excepting the United States or its property. The statute is invalid, first, if through its withholding provisions it taxes the United States. Further, the tax lien which the statute purports to impose upon the severed resources and the machinery, tools, and equipment is unconstitutional as applied to resources or equipment owned by the United States. These propositions can readily be established and we will discuss them in turn. The appropriate dis-

position of the case, however, turns ultimately upon the meaning of the taxing statute and whether state law purports to accomplish these unconstitutional objectives. Owing to the failure of the court below to express itself on these questions, whether because they were not urged below or because, though urged, the court saw fit not to discuss them, the meaning and effect of the severance tax statute in relation to the United States is not as clear as it has been in some other cases involving similar issues (e. g., *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95).

The taxing statute is invalid, we submit, if it taxes the United States. The court below held that the immunity of the United States from state and local taxation does not inure to a person, firm or corporation merely because such claimant has a contract with or a grant from the Federal Government. The proposition thus stated is now unexceptionable. *Alabama* v. *King & Boozer*, 314 U. S. 1; *James* v. *Dravo Contracting Co.*, 302 U. S. 134. Cf. *Penn Dairies* v. *Milk Control Comm'n*, 318 U. S. 261, 269. But that proposition does not demonstrate the validity of the tax, for the immunity of the United States itself from state and local taxation is long established in history and has not been doubted. *United States* v. *Allegheny County*, 322 U. S. 174. Where governmental action is carried on by the United States itself, and Congress does not affirmatively declare

that its activities shall be subject to taxation, its inherent freedom from taxation continues. Cf. *Mayo* v. *United States,* 319 U. S. 441, 447–448. The opinion below fails to discuss the question whether the statute requires collection of the tax from the United States and so unconstitutionally makes the taxpayer the United States itself.

The severance tax is upon the privilege of severing timber from the soil for sale or commercial purposes. Digest of the Statutes of Arkansas, Sec. 13371 (Appendix, *infra*); *Miller Lumber Co.* v. *Floyd,* 169 Ark. 473; *McLeod* v. *Kansas City Southern Railway Co.,* 206 Ark. 281. The necessary reports and the payment of the tax itself are required of the "severer or producer actually engaged in the operation of severing natural products whether as owner, lessee, concessionaire or contractor." Digest of the Statutes of Arkansas, Sec. 13382. (Appendix, *infra.*) The United States is not the severer. If the statute left the ultimate liability with the severer, the tax would be a valid one even though economic forces might compel the severer to charge the tax back to the United States in the form of a lower price for timber removed. We see no difference in this respect between a tax the legal incidence of which is upon a vendee of the United States, and a tax or state regulation the legal incidence of which is upon a vendor to the United States, such as were upheld by this Court in *Alabama* v. *King &*

Boozer, supra, and *Penn Dairies* v. *Milk Control Comm'n, supra.* But the fact that the severer or producer must pay the tax in the first instance does not establish the validity of the tax. Unless Congress has spoken to put aside the immunity which otherwise surrounds the activities of the Federal Government, the question remains whether the statute makes the United States ultimately liable for the tax as original owner of the timber. "The taxpayer is the person ultimately liable for the tax itself." *Colorado Bank* v. *Bedford,* 310 U. S. 41, 52; *Federal Land Bank* v. *Bismarck Co.,* 314 U. S. 95.

If the person who must pay the tax in the first instance is compelled by the taxing statute to collect an equivalent amount from the sovereign or from one of its immune instrumentalities, the tax is upon the sovereign itself. The sales tax in *Federal Land Bank* v. *Bismarck Co., supra,* was held invalid for that reason. The tax there was sought to be imposed upon the purchase of materials by a federal land bank, an agency of the United States whose purchases were immunized by Congress from state and local taxation. The taxing statute required the tax to be collected by the state from the retailer, but the retailer was required to add the tax to the sales price, and the statute declared the tax to be a valid debt from the purchaser to the retailer. The state court had held in other cases and in the case of the Federal Land

Bank itself that the incidence of the tax was upon the purchaser, and this Court held that determination to be controlling. Similarly, the Court's opinion in *Alabama* v. *King & Boozer, supra,* necessarily assumes the same point. The statute there also required the seller to collect the tax from the purchaser, and the Government asserted that it was the purchaser, and that the tax was therefore invalid. The Court held that the "soundness of this conclusion turns on the terms of the contract" (314 U. S. at p. 9) and concluded that the United States was not the purchaser and that the tax, therefore, was valid. Finally, as this Court held in *United States* v. *Allegheny County,* 322 U. S. at p. 189, "State law could not obligate the Central Government to reimburse for a valid tax, much less for an invalid one."

The statute here, in terms of general application and without excepting the United States, appears to tax the owner of the land and timber at the time of severance. Section 13382 of the taxing statute, *supra,* provides:

> The reporting taxpayer shall collect or withhold out of the proceeds of the sale of the products severed the proportionate parts of the total tax due by the respective owners of such natural resources at the time of severance.

The statute is plain that the tax is "due by the respective owners of such natural resources."

Moreover, in providing that the reporting taxpayer shall withhold, the statute gives the severer, purchasing timber from the landowner, a plain defense to an action by the owner to recover the full contract price for the timber removed; and in providing that the reporting taxpayer shall collect, the statute gives the severer an action against the owner for the amount of the tax, just as plainly as though it provided that the amount of the tax should be recoverable at law in the same manner as other debts. The same intent is shown by the fourth paragraph of the same section, empowering and requiring the severer operating under a royalty contract "to deduct from any such royalty or other interest the amount of the severance tax herein levied" before making payment to the owner. Failure to comply with any of the provisions of Section 13382 is a misdemeanor punishable by fine.

We submit that if the taxing statute is applicable to the United States as owner of the timber lands, the statute places the ultimate liability for the tax upon the sovereign, and so far as it does so, the statute is invalid. There is no question here that the activity of selling the timber from federally-owned forests is one in which the Federal Government may constitutionally indulge. The Congressional program of preservation of forest lands, the cultivation of timber, and the systematic cutting and sale of

timber so as to maintain a constant supply of new growth is at least a half-century old. Act of March 3, 1891, c. 561, 26 Stat. 1095, Sec. 24; Act of June 4, 1897, c. 2, 30 Stat. 11, 34–36. The program is a valid exercise of the power of Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Constitution, Article IV, Section 3, Clause 2. *Light* v. *United States,* 220 U. S. 523; *United States* v. *Grimaud,* 220 U. S. 506; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389; *Hunt* v. *United States,* 278 U. S. 96.

The taxing statute is invalid, moreover, so far as it imposes a lien upon property owned by the United States. Section 13376 of the statute (Appendix, *infra*) places a lien upon any and all natural resources severed, and upon the machinery, tools and implements used in severance. Under the timber sale contract here the title to all timber included in the agreement remains in the United States until it has been paid for, scaled, measured or counted. (R. 10.) It goes almost without saying that the statute cannot validly subject the property of the United States to a lien. The constitutional power of Congress to dispose of and make all needful rules and regulations respecting the property of the United States necessarily excludes any such operation of the state law. *Wisconsin Railroad Co.* v. *Price*

County, 133 U. S. 496; *United States* v. *Rickert*, 188 U. S. 432, 439; *New Brunswick* v. *United States*, 276 U. S. 547.

2. The foregoing discussion is based upon the assumption that the Arkansas statute actually taxes the United States—that the severer is required to withhold the amount of the tax from the United States, that he is given recourse against the United States, and that a lien attaches to property of the United States. However, if the state statute were to be construed so as not to bring these provisions into play against the Government, it is probable that the tax would be valid as applied to the severer alone. Although the state legislation seems all inclusive on its face, making no explicit exception for the United States, it is wholly possible that the Supreme Court of Arkansas might rule that it is inapplicable to the United States, and that when the owner is the United States, the tax applies only to the severer, without liens against property of the United States, etc. Or, conceivably, even if those provisions were construed to apply to the United States and even if they were held to be unconstitutional, the Supreme Court of Arkansas might still hold that the state statute is separable and that a valid tax remains against the severer. Whether the Arkansas court would place such interpretations upon the statute is conjectural and we do not express any opinion on the matter.

II

THE NATIONAL FOREST IS NOT AN AREA OVER WHICH THE UNITED STATES HAS EXCLUSIVE JURISDICTION

The United States has broad powers of regulation within the area embraced by the national forest. It does so by virtue of its powers to hold and protect its own property and dispose of its property as it sees fit. *Light* v. *United States, supra,* 220 U. S. 523; *Utah Power & Light Co.* v. *United States, supra,* 243 U. S. 389; *Hunt* v. *United States, supra,* 278 U. S. 96. As we have shown, the Arkansas severance tax statute is unconstitutional to the extent that it interferes directly with those powers. But we think that the state has legislative jurisdiction within the national forest except insofar as the state's enactments may conflict with the exercise of constitutional powers by Congress. In holding that the United States has exclusive legislative jurisdiction over the part of the national forest created by the reservation of lands from the public domain, we think that the court below is in error.

The United States may obtain the exclusive power of legislation over territory within a state in either of two ways: Through a cession by the state to the United States of exclusive jurisdiction, or by the purchase of lands within a state and with its consent for needful buildings pursuant to Article I, Section 8, Clause 17 of the Con-

stitution.[1] *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525. Whichever method of transferring jurisdiction is involved, acceptance of exclusive jurisdiction by the United States is necessary; the grant may be accepted or declined. *Mason Co.* v. *Tax Comm'n*, 302 U. S. 186; *Atkinson* v. *Tax Comm'n*, 303 U. S. 20. With respect to land acquisitions by the United States prior to February 1, 1940,[2] acceptance on the part of the United States could be presumed, at least where such jurisdiction was not evidently prejudicial to the United States, but it will not be presumed where Congress has shown its intention that legislative jurisdiction should not vest. *Mason Co.* v. *Tax Comm'n, supra.*

[1] That provision reads as follows:

> Section 8. The Congress shall have power . . .
>
> * * * * * *
>
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—

[2] The Act of February 1, 1940, c. 18, 54 Stat. 19, amending Revised Statutes, Sec. 355, provides that exclusive jurisdiction shall be presumed not to have been accepted unless the head of the interested federal agency or department files a notice of acceptance with the governor of the state in which the lands are situated. See *Adams* v. *United States*, 319 U. S. 312.

In the instant case the state has not ceded exclusive jurisdiction to the United States, and in so far as the state has consented to the acquisition by the United States of lands to be incorporated in the national forest, the United States has not accepted exclusive jurisdiction.

1. *Lands reserved from the public domain.*— Upon admission of Arkansas to statehood in 1836 upon an equal footing with the original states (Act of June 15, 1836, c. 100, 5 Stat. 50) the legislative authority of Arkansas extended over the federally-owned lands within the state to the same extent as over similar property held by private parties, save that the state could enact no law which would conflict with the powers reserved to the United States by the Constitution. *Fort Leavenworth R. R. Co.* v. *Lowe, supra; Utah Power & Light Co.* v. *United States, supra.* With respect to such lands as were at that time owned by the United States and which may later have been incorporated in the national forest, exclusive jurisdiction did not pass to the United States by virtue of the provisions of Article I, Section 8, Clause 17 of the Constitution, for there was no "purchase" of such lands by the United States with the "consent" of the state. The United States, therefore, did not acquire exclusive jurisdiction unless it has been ceded by the state in some other way. *Fort Leavenworth R. R. Co.* v. *Lowe, supra,* pp. 530–531.

We think that exclusive legislative jurisdiction has not been ceded by Arkansas. The Arkansas legislature has given its consent to the purchase of lands by the United States in Arkansas for the erection of public buildings (Digest of the Statutes of Arkansas, Sec. 5644, Appendix, *infra*) and to some acquisitions for national forests. (Id., Sec. 5646, Appendix, *infra.*) But the legislature has not enacted a statute ceding to the United States such legislative jurisdiction as would exclude the power of the state to tax those transactions within the national forest which the state taxing power may otherwise competently reach. The state has purported to confer some limited legislative powers upon Congress in Section 5647, Appendix, *infra,* but that section falls far short of ceding exclusive jurisdiction. It does nothing more than to recognize the power of Congress to administer and protect federal property, and that power owes its existence to no statutory transfer by a state. The court below erred in holding that the state lacks jurisdiction to exercise its taxing power over lands placed in the national forest by reservation from the public domain.

2. *Lands acquired by the United States.*—The question remains whether those lands which were brought into the national forest by acquisition by the United States were purchased for needful buildings with the consent of the state, so as to give the United States exclusive jurisdiction under

Article I, Section 8, Clause 17. We think that they were not.

(a) On this portion of the case the court below rested its decision on its view of the consent statute, Digest of the Statutes of Arkansas, Sec. 5646, and held that the consent under that statute was qualified and reserved taxing jurisdiction to the state. The question whether the state has yielded or reserved taxing jurisdiction under that statute is a federal question upon which the state court's interpretation is not conclusive. *Mason Co.* v. *Tax Comm'n, supra,* 302 U. S. 186, 197. The court below compared the statute with the West Virginia statute involved in *James* v. *Dravo Contracting Co., supra,* 302 U. S. 134. We think that the statutes are not similar. The consent statute in the *Dravo* case reserved the right to execute process within the limits of the land acquired by the United States, "and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition." The jurisdiction ceded was "Concurrent jurisdiction with this State"—that provision was a late addition to the statute, and the additional reservation which was attached to the right to serve process was added at the same time, so as to make the reservation more comprehensive. The reservation to the consent statute here is neither so broad nor does it have similar history.

Section 5646, Digest of the Statutes of Arkansas, reserves to Arkansas a "concurrent" jurisdiction—

> * * * so far that civil process in all cases, and such criminal process as may issue under the authority of the State of Arkansas against any person charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this Act had not been passed.

With respect to civil matters, at least, the jurisdiction reserved is "concurrent" only so far that the state may serve process in civil cases. The reservation of the right to serve process has always been regarded as a reservation not inconsistent with the transfer of a jurisdiction otherwise exclusive. Its purpose is to prevent the federal area from being a sanctuary for fugitives from justice (see *James* v. *Dravo Contracting Co., supra,* p. 147; *Fort Leavenworth R. R. Co.* v. *Lowe, supra,* p. 533) and its intent is fulfilled by the accomplishment of that purpose. True, the state may give a partial or qualified consent to purchases by the United States, and in such cases the jurisdiction transferred is limited according to the consent given. *James* v. *Dravo Contracting Co., supra; Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, 99. But from the proposition that a state may qualify its consent, it does not follow that the jurisdiction of the United States is limited where the state has not so qualified its consent.

The reservation of the right to serve process in all civil cases does not imply that the state shall have legislative jurisdiction in civil matters over the area purchased by the United States. *Bowen* v. *Johnston*, 306 U. S. 19, 29. With respect to criminal matters the statute reserves the right to serve process against any person charged with a crime committed "without or within said jurisdiction." This peculiar language may imply that the state's legislative jurisdiction in criminal matters is to continue over the federally-owned land. That question is not involved here, except that the language of the statute in regard to criminal process is different from the language in regard to civil process, and if the state intended that its criminal laws and its civil laws both should continue in force over the federally-owned land, it would doubtless have used the same language to qualify its consent for both purposes.

(b) Although we disagree with the analysis of the court below on the meaning and scope of the state's consent statute, we nevertheless agree that the United States did not acquire exclusive jurisdiction. Passing the question whether the lands were acquired by the United States for "needful buildings" within the meaning of Article I, Section 8, Clause 17 (cf. *James* v. *Dravo Contracting Co.*, 302 U. S. at 142–143; *Mason Co.* v. *Tax Comm'n.*, 302 U. S. at 203), Congress has shown its intention not to accept exclusive jurisdiction.

The Act of March 1, 1911, c. 186, 36 Stat. 961,

Section 7 of which authorizes the Secretary of Agriculture to purchase lands for national forests, provides in Section 12 (both Appendix, *infra*) that the civil and criminal jurisdiction over persons or lands acquired under the Act shall not be changed by their reservation as forest lands, and that the inhabitants of a state shall not, by reason of the existence of a national forest, "be absolved from their duties as citizens of the State." See also the Act of June 4, 1897, c. 2, 30 Stat. 11, 36. The court below erred in holding that these statutes do not permit state taxation.

CONCLUSION

The Arkansas severance tax statute, if applied to require withholding of the tax as against the United States or to impose a lien upon federal property, is unconstitutional. The tax is not objectionable, as the court below held, on the ground that the state lacks taxing jurisdiction over any part of the territory in the national forest, with respect to transactions otherwise within the state's reach.

Respectfully submitted.

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DECEMBER, 1945.

APPENDIX

Act of June 4, 1897; c. 2, 30 Stat. 11, 35:

* * * * *

For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation, published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists; payments for such timber to be made to the receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe; and the moneys arising therefrom

shall be accounted for b the receiver of such land office to the Commissioner of the General Land Office, in a separate account, and shall be covered into the Treasury. Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior, not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make report in writing to the Commissioner of the General Land Office and to the receiver in the land office in which such reservation shall be located of his doings in the premises.

* * * * *

(16 U. S. C. 1940 ed., Sec. 476.)

Act of March 1, 1911, c. 186, 36 Stat. 961:

SEC. 7. That the Secretary of Agriculture is hereby authorized to purchase, in the name of the United States, such lands as have been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said commission: *Provided,* That no deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this Act until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams. (16 U. S. C. 1940 ed., Sec. 516.)

SEC. 12. That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation and administration as national forest lands, except so far as the punishment of offenses

against the United States is concerned, the intent and meaning of this section being that the State wherein such land is situated shall not, by reason of such reservation and administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State. (16 U. S. C. 1940 ed., Sec. 480.)

Digest of the Statutes of Arkansas (Pope, 1937):

§ 5644. *Consents to any purchase by United States.* The State of Arkansas hereby consents to the purchase to be made or heretofore made, by the United States, of any site or ground for the erection of any armory, arsenal, fort, fortification, navy yard, customhouse, lighthouse, lock, dam, fish hatcheries, or other public buildings of any kind whatever, and the jurisdiction of this State, within and over all grounds thus purchased by the United States, within the limits of this State, is hereby ceded to the United States. Provided, that this grant of jurisdiction shall not prevent execution of any process of this State, civil or criminal, upon any person who may be on said premises. Act April 29, 1903, p. 346, § 1.

§ 5646. *Forest lands.* The consent of the State of Arkansas be and is hereby given to the acquisition by the United States, by purchase, or otherwise with adequate compensation, of such land in Arkansas as in the opinion of the Federal Government may be needed for the establishment, consolidation and extension of National Forests in the State, for the purpose of the Act of Congress entitled "An Act to Enable any State to cooperate with any other State or States, or with the United

States, for the protection of the Watershed of Navigable Streams and to Appoint a Commission for the Acquisition of Lands for the Purpose of Conserving the Navigability of Navigable Rivers," approved March 1st, 1911, (36 Statute, 961), and acts supplementary thereto and amendatory thereof; provided, that this Section applies only in those counties where the United States now owns land comprising National Forests and in Counties adjoining the aforesaid Counties; further provided, that the State of Arkansas shall retain a concurrent jurisdiction with the United States in and over lands so acquired so far that civil process in all cases, and such criminal process as may issue under the authority of the State of Arkansas against any person charged with the commission of any crime without or within said jurisdiction, may be executed [sic] thereon in like manner as if this Act had not been passed.

§ 5647. *Jurisdiction.* Power is hereby conferred upon the Congress of the United States to pass laws and to make or provide for the making of such rules and regulations of both a civil and criminal nature, and provide punishment therefor, as in its judgment may be necessary for the administration, control and protection of such lands as have been acquired or may hereafter be acquired under the provisions of this act. Id. § 2.

§ 13371. *Tax levied.* There is hereby levied a privilege or license tax, to be known as "the Severance Tax," for the year 1923 and for each subsequent year, upon each person, firm, corporation or association of persons, hereinafter called "the producer,"

engaged in the business of mining, cutting or otherwise severing from the soil or water for commercial purposes natural resources, including minerals and ores, pearls, diamonds, and other precious stones, bauxite, fuller's earth, phosphates, shells, chalk, cement, clay, sand, gravel, asphalt, ochre, oil, gas, salt, sulphur, lignite, coal, marble, stones and stone products, timber, turpentine and all other forest products and all other natural products of the soil or water of Arkansas. Section 1, Act 118 of 1923.

§ 13375. *Tax on bauxite; coal; timber.*

* * * * *

(c) On Timber. Every producer of timber shall be subject to all the the [sic] provisions of this Act, except that instead of a tax of two and one-half (2½%) per cent of the gross market value of said products, the producer of timber shall pay a privilege tax equivalent to seven cents (7¢) per thousand feet board measure on the total stumpage severed or cut during the preceding month, irrespective of the market value thereof. Provided that no tax herein levied shall apply to the producer of switch ties who hews out or makes such ties entirely by hand. Ib. § 5 as amended by Act 116 of 1933. Sec. 1.

§ 13376. *Lien on resources for tax.* The State of Arkansas shall have a lien upon any and all natural resources severed from the soil or water for the tax and penalties herein imposed and, in addition thereto, said lien shall attach to the well, machinery, tools and implements used in severing of such resources. Act 118 of 1923, Sec. 6, as amended by Act 283 of 1929. Sec. 4.

§ 13382. *Who liable for tax.* Except as otherwise in this Section provided, the mak-

ing of said reports and the payment of said privilege taxes shall be required of the severer or producer actually engaged in the operation of severing natural products whether as owner, lessee, concessionaire or contractor.

The reporting taxpayer shall collect or withhold out of the proceeds of the sale of the products severed the proportionate parts of the total tax due by the respective owners of such natural resources at the time of severance.

And in the case of oil and gas, such production as shall be sold or delivered to any pipe line company and transported by it through pipes connected with the oil or gas well of the owner shall notwithstanding such sale or delivery be liable for the tax herein levied.

Every producer actually operating any oil or gas well, quarry or other property from which natural resources are severed, under contract or agreement requiring payment direct to the owner of any royalty, excess royalty or working interest, either in money or in kind, is hereby authorized, empowered and required to deduct from any such royalty or other interest the amount of the severance tax herein levied before making such payment.

Any person, firm, corporation or association failing or refusing to comply with any of the provisions of this Section shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than Fifty Dollars ($50.00) nor more than Five Hundred Dollars ($500.00), for each offense. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1949

SUPREME COURT OF THE UNITED STATES.

Nos. 328 and 329.—October Term, 1945.

Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, Partners Doing Business as Wilson Lumber Company, Appellants,	
328 *vs.*	
Otho A. Cook, Commissioner of Revenues for the State of Arkansas.	Appeal from and Writ of Certiorari to the Supreme Court of Arkansas.
Otho A. Cook, Commissioner of Revenues for the State of Arkansas, Petitioner,	
329 *vs.*	
Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, Partners Doing Business as Wilson Lumber Company.	

[March 4, 1946.]

Mr. Chief Justice Stone delivered the opinion of the Court.

An Arkansas statute, Act 118 of 1923, Pope's Digest, Arkansas Statutes (1937), § 13371, imposes "a privilege or license tax . . . upon each person . . . engaged in the business of . . . severing from the soil . . . for commercial purposes natural resources, including . . . timber." By § 13372, as a condition of the license, there is imposed on the severer an obligation to pay the tax and consent that the tax "shall . . . remain a lien on each unit of production until paid into the State Treasury." Section 13375 fixes the tax at 7 cents per thousand feet of the timber severed. Section 13376 provides that the state "shall have a lien upon any and all natural resources severed from the soil". In § 13382 it is provided that "the payment of said privilege taxes shall be required of the severer . . . actually engaged in the operation of severing natural products, whether as owner, lessee, concessionaire or contractor. . . . The reporting taxpayer shall collect or withhold out of the proceeds of the sale of the products severed the proportionate parts of the total tax due by the respective owners of such natural resources at the time of severance."

Appellants in No. 328, a copartnership, entered into contracts with the United States for the purchase and severance of timber on national forest reserves located within the state, some of which were public lands of the United States when Arkansas was admitted to statehood and some of which were acquired by the United States by purchase with the consent of the state. The contracts of severance and purchase provided that "title to all timber included in this agreement shall remain in the United States until it is paid for, and scaled, measured or counted." By the contracts the appellants were required in advance of severance to place with the Government representative advance installments of the estimated purchase price.

In the years 1937 to 1942, appellants, proceeding under their contract, severed timber from the forest reserves in question. An execution having been issued and delivered to the county sheriff, appellee in No. 328, and also appellant in No. 329, for collection of the tax assessed against appellants in No. 328 for the years in question, they brought the present suit in the state chancery court to enjoin the collection. The questions on which the parties ask decision are (a) whether the forest reserves which were public lands of the United States before Arkansas was admitted to statehood are subject to the taxing jurisdiction of the state; (b) whether the forest reserves acquired by the United States by purchase remain subject to the taxing authority of the state; and (c) whether the tax is unconstitutional as a tax laid upon the property or activities of the United States, or because the tax laid on plaintiffs imposed an unconstitutional burden on the United States.

The chancery court gave judgment for plaintiffs enjoining collection of the tax. It held that if the tax "be applied" to plaintiffs, it "would be a tax upon the operations of the Government of the United States", and that the tax "does not apply to timber severed by the plaintiffs from the National Forest." On appeal the Supreme Court of Arkansas modified the judgment, holding that the state was without authority to lay a tax on the severance of timber from lands which were public lands of the United States when Arkansas was admitted to statehood; that the authority of the state to lay the tax extended to transactions occurring on the forest reserve acquired by the United States by purchase; and that the present tax assessed against plaintiffs for the severance of timber on forest reserves of this class did not lay an unconstitutional burden on the United States. — Ark. —, —.

Plaintiffs have appealed, in No. 328, from so much of the judgment as sustained the tax with respect to lands acquired by the United States by purchase, urging in their assignments of error that the Supreme Court of Arkansas erred in reversing the judgment of the chancery court, "which held to be void the severance tax statute", and in holding that the severance tax law is not repugnant to the supremacy clause, Art. VI, cl. 2 of the Constitution, or to Art. IV, § 3, cl. 2, conferring on Congress power to dispose of "and make all needful Rules and Regulations respecting . . . Property belonging to the United States." Defendant, appellant in No. 329, seeks by his appeal to reverse so much of the judgment as denied the right to levy the tax for severance of timber from forest lands reserved from the public domain. On submission of the jurisdictional statements in this Court we postponed to the hearing on the merits consideration of our jurisdiction in No. 328. In No. 329 we dismissed the appeal for want of jurisdiction. § 237(a) of the Judicial Code as amended, 28 U. S. C. § 344(a). Treating the papers on which the appeal was allowed as a petition for writ of certiorari, as required by § 237(a) of the Judicial Code as amended, we granted certiorari.

Under § 237 of the Judicial Code we are without jurisdiction of the appeal in No. 328, unless there was "drawn in question" before the Supreme Court of Arkansas "the validity of a statute" of the state, "on the ground of its being repugnant to the Constitution, . . . or laws of the United States." The purpose of this requirement is to restrict our mandatory jurisdiction on appeal, *Memphis Gas Co.* v. *Beeler*, 315 U. S. 649, 651, and to make certain that no judgment of a state court will be reviewed on appeal by this Court unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds, *Charleston Ass'n* v. *Alderson*, 324 U. S. 182, 185-6 and cases cited, or, when the statute, as applied, is so assailed, until it has opportunity authoritatively to construe it. *Fiske* v. *Kansas*, 274 U. S. 380, 385 and cases cited. This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state, *Wall* v. *Chesapeake & Ohio R. Co.*, 256 U. S. 125, 126; *Citizens Nat'l Bank* v. *Durr*, 257 U. S. 99, 106, or has in fact been decided by it, *Nickey* v. *Mississippi*, 292 U. S. 393, 394; *Whitfield* v. *Ohio*, 297 U. S. 431, 435-6, and that its decision was necessary to the judgment. *Cuyahoga Power*

Co. v. *Northern Realty Co.*, 244 U. S. 300, 304 and cases cited. The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiffs asserted the invalidity of a state statute on any federal ground. The bill of complaint in the chancery court set up only that the demand of the state for the tax "is an illegal and void exaction" and "is in violation of" Art. IV, § 3, cl. 2 and of Art. VI, cl. 2 of the Constitution. There were no assignments of error in the Supreme Court of Arkansas.

As the record does not show that the plaintiffs presented for decision to the state Supreme Court any federal question, they have no appeal to this Court unless the opinion of the state Supreme Court shows that that court ruled on the validity of a state statute under the laws and Constitution of the United States. *Charleston Assn* v. *Alderson*, *supra*, 185-6 and cases cited. That court's opinion, while holding that the "tax law" was applicable to "persons severing timber from lands of the United States in the national forest", does not indicate that plaintiffs raised there, or that the court passed upon, the validity of the statute as applied. The court considered only the validity of "the tax", not that of the statute.

With reference to plaintiffs' liability for the tax it decided only that the state "has the right to collect the severance tax, so far as territorial jurisdiction is concerned", for severance of timber from lands acquired by the United States by purchase, and that plaintiffs could not claim the benefits of the immunity, if any, of the Federal Government from "the tax", since it was imposed on plaintiffs, not the Government or its property. It said that the Government was not constitutionally immune from such economic burden as might be passed on from the taxpayer to the Government by reason of the effect of the tax paid by the severers, citing *James* v. *Dravo Contracting Co.*, 302 U. S. 134 and *Alabama* v. *King & Boozer*, 314 U. S. 1. Being asked to enjoin the collection of the tax, the state court contented itself with holding that the tax, which was assessed on plaintiffs and not the Government, imposed no burden on the Government which infringed its implied constitutional tax immunity. Since the collection of a tax by a state officer, as here, may or may not offend against the Constitution, independently of the constitutionality of a statute, see *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 369, the state court, in holding the tax consti-

tutional, did not necessarily pass on the constitutional validity of the statute.

In order to support an appeal to this Court it is necessary that the question of the validity of the state taxing statute be either presented to the state court or decided by it. It is not sufficient merely to attack, as here, the tax levied under the statute, or "the right to collect the tax" which has been levied, or to show that the validity of the tax alone has been considered. *Charleston Assn.* v. *Alderson*, *supra*, 185, and cases cited. For "the mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis" of an appeal. *Jett Bros. Co.* v. *City of Carrollton*, 252 U. S. 1, 6. It is for this reason that we have held that an appeal will not be sustained where there has been only an attack upon a tax assessment, *Jett Bros. Co.* v. *City of Carrollton*, *supra*; *Miller* v. *Board of County Comm'rs*, 290 U. S. 586; *Memphis Gas Co.* v. *Beeler*, *supra*, 650; *Commercial Credit* v. *O'Brien*, 323 U. S. 665; *Charleston Assn.* v. *Alderson*, *supra*, 185, or, as here, upon a "tax", *Citizens Nat'l Bank* v. *Durr*, *supra*, 306; *Indian Territory Illuminating Co.* v. *Board of County Comm'rs*, 287 U. S. 573; *Baltimore Nat'l Bank* v. *State Tax Comm'n*, 296 U. S. 538; *Irvine* v. *Spaeth*, 314 U. S. 575, or upon the attempt to collect a tax, *Jett Bros. Co.* v. *City of Carrollton*, *supra*.

Since plaintiffs' attack is directed to the validity of the tax as laid, and not to the validity of the statute, as applied, we are without jurisdiction of their appeal under § 237 of the Judicial Code. Treating the appeal as a petition for writ of certiorari, as required by § 237(c) of the Judicial Code, we grant certiorari, as we did in No. 329. We can consider only the federal questions passed upon by the state Supreme Court.

Our decision in *James* v. *Dravo Contracting Co.*, *supra*, and in *Alabama* v. *King & Boozer*, *supra*, and the cases cited in those opinions, can leave no doubt that the Supreme Court of Arkansas correctly held that plaintiffs, who are taxed by the state on their activities in severing lumber from Government lands under contract with the Government, cannot claim the benefit of the implied constitutional immunity of the Federal Government from taxation by the state.

Plaintiffs now, for the first time, assail the tax and the statute imposing it, on the ground that the Act requires the severer to collect the tax from the owner of the timber at the time of severance, Pope's Digest, § 13382, and gives to the state a lien on the

land from which the lumber is severed, *id.*, § 13374, and a lien upon the severed timber, *id.*, § 13376, even though title to the severed product has not passed to the taxpayer. They contend that the Act thus purports to place a forbidden tax directly on the United States. Cf. *Mayo* v. *United States*, 319 U. S. 441.

But we are not free to consider these grounds of attack for the reason that they were not presented to the Supreme Court of Arkansas or considered or decided by it. While the constitutional question now sought to be presented is in some measure related to that decided by the state court, and, like it, arises under the implied constitutional immunity of the Federal Government from state taxation, it is not merely "an enlargement" of an argument made before the state court, but is so distinct from the question decided by the state court that our decision of the issue raised there would not necessarily decide that now sought to be raised. Compare *Dewey* v. *Des Moines*, 173 U. S. 193, 197, 198. We are therefore not free to consider it.

"In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented." *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 317, and cases cited. For, as we said in *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430, 434-435, "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court." See also *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 633; *Bolln* v. *Nebraska*, 176 U. S. 83, 89-92; *New York* v. *Kleinert*, 268 U. S. 646, 650-1; *Whitney* v. *California*, 274 U. S. 357, 362, 363; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 267-8.

In view of the lien provisions of the statute and its provisions which purport to authorize the taxpayer to collect the tax from the owner of the severed timber, here the Government, it is suggested that we cannot rightly adjudge that the state is entitled to recover the tax on the transactions of severance involved, without determining the applicability of these provisions to the Government and their validity if so applied. We are not now concerned with the Government's liability to the statutory lien or for payment of the tax. It will be time enough to consider its interests when some effort is made to enforce the lien or collect the tax from the United States. We obviously do not by our judgment against the plaintiffs impose the tax on the Government. Their property alone is subject to the lien of the present judgment and to execution issued under it. They cannot recover the amount of the judgment from the Government unless the Constitution permits. And if it forbids they obviously will not collect the tax. In neither case does our judgment impose any burden on the United States. We are not called on to determine whether plaintiffs could have successfully contested their liability in the state courts or here, if the contentions were properly raised, upon the ground that they would be unable to collect the tax from the Government, either because the provision purporting to allow such collection is inapplicable where the owner is the Government or, if applicable, invalid, or on the ground that the tax, applied to them without recourse against the Government, would deny to them the equal protection of the laws.

The state, construing its own law, has rendered an unconditional judgment holding plaintiffs liable for the tax. For purposes of our review we must assume that the judgment conforms to state law. Hence we are called on to determine only federal questions properly raised on the record. Considering the only question of the tax immunity of the United States which is so raised, we decide for reasons already stated that the tax now laid and sustained imposes no unconstitutional burden on the federal Government. No question arising under the Fourteenth Amendment is raised by the record either in the state courts or here, and we are without jurisdiction to pass upon it.*

* Even if the opinion of the Supreme Court of Arkansas had proceeded on a ground so unexpected as to make timely, by petition for rehearing, the raising of the federal questions now for the first time advanced, compare Saunders *v.* Shaw, 244 U. S. 317; Ohio *v.* Akron Park District, 281 U. S. 74, 79, plaintiffs in their petition for rehearing did not suggest them.

A further question is whether the lands in the forest reserve, which were purchased for that purpose by the United States, are within the territorial taxing jurisdiction of the state. The answer turns on the interpretation of the statute of the United States authorizing the acquisition of the lands, §§ 7 and 12 of the Act of March 1, 1911, c. 186, 36 Stat. 961, 16 U. S. C. §§ 480, 516, and of the state statute of Arkansas authorizing the sale. Pope's Digest, § 5646. The meaning of both statutes, as applied in this case, is a federal question, since upon their construction depend rights, powers and duties of the United States. *Mason Co.* v. *Tax Comm'n*, 302 U. S. 186, 197, and cases cited.

The statute of Arkansas consenting to the purchase of forest lands by the United States, provided that the state should "retain a concurrent jurisdiction with the United States in and over lands so acquired . . . ", to issue and execute "civil process in all cases, and such criminal process as may issue under the authority of the State . . . ". It made no express grant or reservation of legislative power over the areas purchased. Hence the statute cannot be taken as having yielded or intended to surrender to the Federal Government the state legislative jurisdiction over the area in question, so far as exercise of that jurisdiction is consistent with federal functions. Any doubt as to the effect of such a grant by the state in conferring exclusive legislative jurisdiction over the territory which is acquired by the Federal Government is removed by the provisions of the federal statute.

Section 12 of the federal statute, authorizing the purchase, provided:

> "That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation . . . as national forest lands, except so far as the punishment of offenses against the United States is concerned, the intent and meaning of this section being that the State, wherein such land is situated, shall not, by reason of such reservation and administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State."

By this enactment Congress in effect has declined to accept exclusive legislative jurisdiction over forest reserve lands, and expressly provided that the state shall not lose its jurisdiction in this respect nor the inhabitants "be absolved from their duties

as citizens of the State". Compare *Mason Co.* v. *Tax Comm'n, supra*; *Atkinson* v. *Tax Comm'n*, 303 U. S. 20; *Collins* v. *Yosemite Park*, 304 U. S. 518, 528; *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 99.

Our conclusion, based on the construction of the interrelated state and federal statutes, is that the state has territorial jurisdiction to lay the tax upon activities carried on within the forest reserve purchased by the United States.

What we have said of the argument that the tax assessed on plaintiffs is an unconstitutional burden on the Government, is applicable to the tax assessed for severance of timber from forest reserve lands which, from the beginning, have been a part of the public domain. That tax is likewise valid if the state has legislative jurisdiction over such lands within its boundaries.

Upon admission of Arkansas to statehood in 1836 upon an equal footing with the original states, (Act of June 15, 1836, c. 100, 5 Stat. 50) the legislative authority of the state extended over the federally owned lands within the state, to the same extent as over similar property held by private owners, save that the state could enact no law which would conflict with the powers reserved to the United States by the Constitution. *Ft. Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525, 539; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 404. Such authority did not pass to the United States by virtue of the provisions of Article I, § 8, cl. 17 of the Constitution, which authorize it "to exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be".

Since the United States did not purchase the lands with the consent of the state, it did not acquire exclusive jurisdiction under the constitutional provision, and there has been no cession of jurisdiction by the state. *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 651; *Mason Co.* v. *Tax Comm'n, supra*, 240. Although Arkansas has, by § 5647, Pope's Digest, conferred on Congress power to pass laws, civil and criminal, for the administration and control of lands acquired by the United States in Arkansas, it has ceded exclusive legislative jurisdiction neither over lands reserved by the United States from the public domain nor over lands acquired in the state. *Ft. Leavenworth R. R. Co.* v. *Lowe, supra*, 530, 531. It follows that the state has retained its legislative jurisdiction, which it acquired by statehood, over public lands within the state, which have been included within the forest reserve.

We conclude that the state has legislative jurisdiction over the federal forest reserve lands located within it, whether they were originally a part of the public domain of the United States or were acquired by the United States by purchase, and that the tax assessed against plaintiffs is not subject to any constitutional infirmity, or to any want of taxing jurisdiction of the state to lay it with respect to transactions on the federal forest reserve located within the state.

The judgment is reversed insofar as it adjudged plaintiffs not liable for the tax on severance of timber from lands held by the United States as original owner, and the cause is remanded to the Supreme Court of Arkansas for further proceedings not inconsistent with this opinion. In all other respects the judgment is affirmed. On the remand the state courts will be free, so far as their own practice allows, to determine any state questions here involved and any federal questions not already decided by this opinion. Compare *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506, with *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113.

So ordered.

Mr. Justice DOUGLAS concurs in the result.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

Mr. Justice RUTLEDGE, dissenting.

In No. 328 the Court sustains the application of the Arkansas severance tax to the appellants.[1] As I understand the opinion this rests on the view that the Arkansas Supreme Court decided that the statute[2] directs the tax to be thus levied, whether or not the lien and collection provisions are applicable to the United States and, so taking its action, that the tax as applied is constitutional. I cannot accept this view of the Arkansas court's decision or of the validity of the tax in its present application. In my judgment the cause should be remanded to the state court for it to determine the applicability of the lien and collection pro-

[1] On the jurisdictional discussion of the Court the appellants are, of course, petitioners on certiorari.

[2] Pope's Digest Ark. (1937) §§ 13371-13395. The statute was first enacted in 1923. Acts of Arkansas, 1923, Act 118. It was materially amended in 1929, but its essential scheme remained the same. Acts of Arkansas, 1929, Act 283.

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SUPREME COURT OF THE UNITED STATES.

Nos. 328 and 329.—October Term, 1945.

Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, Partners Doing Business as Wilson Lumber Company, Appellants,	
328 *vs.*	
Otho A. Cook, Commissioner of Revenues for the State of Arkansas.	Appeal from and Writ of Certiorari to the Supreme Court of Arkansas.
Otho A. Cook, Commissioner of Revenues for the State of Arkansas, Petitioner,	
329 *vs.*	
Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, Partners Doing Business as Wilson Lumber Company.	

[March 4, 1946.]

Mr. Justice Rutledge, dissenting.

In No. 328 the Court sustains the application of the Arkansas severance tax to the appellants.[1] In my judgment the cause should be remanded to the state court for it to determine the applicability of the lien and collection provisions to the United States, or their severability, and in the light of that determination to ascertain the constitutional validity of the tax as applied to appellants. These issues are inescapable on the record in this case. For until they are determined any decision here can affect only a tax of uncertain incidence, unless the Court in sustaining it means to rule, as I think the Arkansas court ruled, that the tax is valid whether or not the statute's lien and collection provisions[2] apply to the United States as owner of the land and the severed timber.

[1] On the jurisdictional discussion of the Court the appellants are, of course, petitioners on certiorari.

[2] Pope's Digest Ark. (1937) §§ 13371-13395. The statute was first enacted in 1923. Acts of Arkansas, 1923, Act. 118. It was materially amended in 1929, but its essential scheme remained the same. Acts of Arkansas,

Neither course is properly open to us. Since the Arkansas court, as this Court's opinion does not dispute, has sustained the tax without deciding whether the lien and collection provisions are severable and inapplicable to the United States, we are completely at loss to know whether the tax rests ultimately upon the Government, as it does under Arkansas law on all other owners not expressly exempted. Consequently we have no determinable issue, but only a speculative inquiry of a sort beyond the tradition and, in my opinion, the jurisdiction of this Court to decide. On the other hand, if the effect of the decision here, as in the Arkansas court, is to sustain the tax regardless of whether the lien and collection provisions apply in whole or in part to the United States, the result is substantially to sustain a tax laid by the state directly on the Government. This result is as unacceptable as to render an advisory opinion upon the validity of a tax of uncertain and speculative application.

From *McCulloch* v. *Maryland*, 4 Wheat. 316, to now the rule has remained that the states are without power, absent the consent of Congress, to tax the United States, whether with reference to its property or its functions. *United States* v. *Allegheny County*, 322 U. S. 174, 177. That rule is of the essence of federal supremacy. It is not to be chipped away by ambiguous decisions of state courts or easy assumptions relating to their effects which ignore the direct impact of state taxes where they have no right to strike.

This is true regardless of the vagaries of decision, at different periods, in allowing expansion of the Government's immunity to include others. Recent recessions from former broad extensions of this kind have settled that ultimate economic incidence upon

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1929, Act 283. See notes 4-6, 9-12, and text, for the substance and effects of the provisions.

Although, as I read its opinion, the Arkansas court carefully refrained from ruling upon their severability and therefore also their applicability to the Government (see text *infra*), the lien and collection provisions were before it, were cited in the opinion, and were necessarily involved in the issues presented. The Court appears to have ruled that the tax is valid as applied to the appellants regardless of whether these provisions are severable or are applicable to the United States. That it did so furnishes no ground for believing that the issues relating to them were not presented or were waived. The petition for rehearing, as well as the opinion itself, demonstrates the contrary. The first ground set forth was: "The Court erred in holding that the tax was not a direct tax on the United States."

the Government of a state tax laid upon others is not alone enough to invalidate the tax. *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Alabama* v. *King & Boozer*, 314 U. S. 1; see *Penn Dairies* v. *Milk Control Com'n*, 318 U. S. 261, 269.[3] But this does not mean either that such incidence of the tax is irrelevant to its validity or that all state taxes purporting to be laid upon others but in fact reaching the Government are valid.

It is still true that "the taxpayer is the person ultimately liable for the tax itself." *Colorado Bank* v. *Bedford*, 310 U. S. 41, 52; *Federal Land Bank* v. *Bismarck*, 314 U. S. 95. If the person who must pay the tax in the first place is required by the taxing statute to collect the tax or an equivalent amount from the United States, the tax is upon the United States. "State law could not obligate the Central Government to reimburse for a valid tax, much less for an invalid one." *United States* v. *Allegheny County*, 322 U. S. 174, 189. Although the Court has gone far in permitting the states to force one private person to act as tax collector for another, cf. *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86; *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62; *General Trading Co.* v. *Iowa Tax Com'n*, 322 U. S. 335, and dissenting opinion at 339, that device cannot be utilized by the states to lay taxes on the United States. Nor has it been held heretofore, if it is now, that a tax purporting to be laid upon a private individual or concern is valid regardless of whether the provisions of the state taxing statute for passing on the tax to another are applicable to the United States or are valid if so applied.

I am unable to comprehend the effect of the Court's decision. If it is ruling *sub silentio* or *ex hypothesi* that the lien and collection provisions of the Arkansas statute, for any application to the Government, are inapplicable or severable, we have no right to make such a decision. That is the business of the Arkansas courts. If the ruling is that the tax is valid even though those provisions are applicable to the United States, then for the first time the Court is overruling the basic principle of *McCulloch* v. *Maryland*. If the decision is, finally, that the tax is valid whether

[3] See Powell, The Waning of Intergovernmental Tax Immunities (1945) 58 Harv. L. Rev. 633; Powell, The Remnant of Intergovernmental Tax Immunities (1945) 58 Harv. L. Rev. 757.

or not the lien and collection provisions are applicable or severable, then it embodies both faults.

I do not think the Court means to overrule *McCulloch* v. *Maryland*. Nor does it purport to interpret or determine the Arkansas law concerning either applicability or severability of the statute's provisions. But unless it is doing this, without so stating, I see no escape from the other horn of the dilemma. Either the tax as applied is valid or it is invalid. Whether it is valid or not depends on whether the lien and collection provisions apply to the United States, for they place the tax directly upon the owner. That issue is inescapable in this case, whether in the Arkansas court or here.

I do not think the Arkansas court decided either that the lien and collection provisions are inapplicable to the United States or that they are severable from the remainder of the statute, notwithstanding it had those provisions before it, cited them though without ruling upon them, and proceeded to sustain the application of the tax to appellant. I think it clear that the court avoided making such a ruling. In my opinion the Arkansas decision in effect, though not in words, was that the tax is valid regardless of whether the enforcement provisions apply to the United States, which in effect was to rule that the tax had been constitutionally applied even though the collection provisions are applicable to the United States, to the extent at least of the withholding provisions.

My reasons for this view are several. In the first place, the court's opinion, though noting the collection and lien provisions and the contract's term that title to the severed timber should remain in the Government "until it has been paid for, and scaled, measured or counted," does this in the introductory statement of the case and then proceeds through a lengthy discussion without again referring to those provisions.

Moreover they provide plainly that where the severer is different from the owner, the former must pay the tax but he is required to pass it on to the owner.[4] A further provision requires him to withhold the amount of the tax from any money or

[4] Pope's Digest Ark. § 13382 provides: "The reporting taxpayer *shall* collect or withhold *out of the proceeds of the sale* of the products severed the proportionate parts of the total tax *due by the respective owners of such natural resources* at the time of severance." (Emphasis added.)

severed property in kind due the owner under their contract.[5] Another section gives the state a lien on the severed resources for the tax and penalties.[6] The clear effect of the provisions requiring "the reporting taxpayer" to "collect or withhold" the amount of the tax from the owner is to give him a defense to the owner's action to recover the full contract price for the severed resources and an equally clear right of action against the owner for the amount of the tax.

Thus the scheme of the tax is to place both its ultimate legal and its ultimate economic incidence on the owner. The tax in terms is "due by the respective owners of such natural resources."[7] It is "a privilege tax or license tax; and is levied on the business of severing," as the Arkansas court declared in this case. — Ark. —, —, 187 S. W. 2d 7, 12. But it is ultimately, as that court has also declared, though not expressly in this case, a privilege or license tax levied upon *the owner's* business of severing, for it applies to him whenever he severs or permits severance for sale; and "sale" includes turning over the timber to one who clears the land as payment for the clearing, although his purpose in doing this is only to make the soil available for tilling.[8]

Moreover, as the Arkansas court did hold specifically in this case, the act contains only two exemptions, neither of which ap-

[5] The provision reads: "Every producer actually operating any oil or gas well, quarry or other property from which natural resources are severed, under contract or agreement requiring payment direct to the owners of any royalty, excess royalty or working interest, either in money or in kind, is hereby authorized, empowered *and required* to deduct from any such royalty or other interest the amount of the severance tax herein levied before making such payment." Pope's Digest Ark. § 13382. (Emphasis added.)

"Producer" is defined as every person, firm, corporation or association of persons "engaged in the business of mining, cutting or otherwise severing from the soil or water for commercial purposes natural resources, including minerals and ores, pearls, diamonds and other precious stones, bauxite, fuller's earth, phosphates, shells, chalk, cement, clay, sand, gravel, asphalt, ochre, oil, gas, salt, sulphur, lignite, coal, marble, stones and stone products, timber, turpentine, and all other forest products and all other natural products of the soil or water of Arkansas." Pope's Digest Ark. § 13371.

[6] Pope's Digest Ark. § 13376: "The State of Arkansas shall have a lien upon any and all natural resources severed from the soil or water for the tax and penalties herein imposed and, in addition thereto, said lien shall attach to the well, machinery, tools and implements used in severing of such resources."

As the section was enacted originally in 1923 the provisions for attachment of the lien to machinery, etc., used in severing was not included. This was added by amendment in 1929. Cf. note 2.

[7] See note 4.

[8] See note 11.

plies to the United States.[9] And on this ground, together with the maxim *expressio unius*, it ruled the act applicable to the severance of timber "in all instances except the two exemptions mentioned."[10]

That ruling, it seems to me, is especially significant when it is considered not only in the light of the court's failure to make further reference to or ruling upon the collection provisions, but also in view of the Arkansas court's previous decisions. Thus in *Miller Lumber Co.* v. *Floyd*, 169 Ark. 473, 480, the court held: "Where a landowner makes a contract with another person to cut and remove the timber from his land for sale or commercial purposes, the owner *must* pay the severance tax; for such contractor and his servants who actually sever the timber *act for the owner on the premises, and their act of severing* the timber *is the act of the owner*."[11] (Emphasis added.)

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[9] One was for the individual owner who occasionally severs in order to build or repair improvements on the premises or for his own use and another for the "producer of switch ties" who hews them out entirely by hand. — Ark. —, —, 187 S. W. 2d 7, 10.

[10] The decision held the tax invalid as applied to the severance from lands held by the United States as original owner, though not as to those purchased with the state's consent.

[11] The effect of the quoted statement is emphasized by its context, in part as follows: "It is apparent then that the owner of lands, who cuts down trees for the purpose of building fences or repairing and constructing houses and other improvements on the land from the timber thus severed from the soil is exempted from paying the tax. It is equally evident that when the timber severed from the soil is sold, it falls within the terms of the act, and the tax must be paid by someone. To illustrate: if the owner of timber lands desired to sever it for the purpose of clearing the land and putting it in cultivation and hired other persons to sever the timber for him, he would be required to pay the severance tax. If the owner should lease his land to another person for a designated number of years in order to have his lessee clear the land and put it in cultivation, and if the consideration for the lease in whole or in part was that the lessee should have the timber so removed from the land, the severance tax would have to be paid by such lessee. It will be noted that the language of the act is specific on this subject and provides that the severer or producer as he is called shall pay the tax. The act is very broad and comprehensive, and is levied upon all persons engaged in severing the timber from the soil for sale or commercial purposes, regardless of the purpose for which it is done. The only exception is that the tax shall not be paid where the timber severed is actually used in erecting or repairing structures and other improvements on the land. The application of the timber in part payment for clearing the land is a severing of it for commercial purposes, although the primary purpose of severing it is to enable the land to be put in cultivation. Where a landowner makes a contract with another person to cut and remove the timber from his land for sale or commercial purposes, the owner must pay the severance tax; for such contractor and his servants who actually sever the timber act for the owner in the premises, and their act of severing the timber is the act of the owner."

In a previous appeal in the same case, 160 Ark. 17, the court had sustained the act as constitutional on the theory that it was a privilege tax and not a property tax.

No reference was made in this case to the *Miller* case. In the absence of one we cannot assume that the court intended to overrule that decision or to destroy its rationalization or universal applicability, except for the specific exemptions. Not only the opinion in this case, as much by it's omissions as by what it expressly rules, but also the Arkansas court's prior decisions, give every ground for believing that it did not intend either to apply the tax differently in this case than in any other, or to overrule its prior determinations of the ultimate nature, character and incidence of the tax.[12]

The majority seem to imply however that this may be exactly what was done; that perhaps the Arkansas court held that since the tax would be unconstitutional if, as the statute contemplates, it were directly placed upon the Government as owner, it would treat the tax as falling not on the Government but on the severer alone. As has been stated, nothing in that court's opinion suggests such a ruling. And if there were either a ruling or a sufficient suggestion of this sort, it would raise other serious questions, not considered by that court or here, concerning the validity of the tax. The effect of such a holding would seem to be to single out contractors with the Government for the imposition of a tax not placed on other severers. All other contractors, by the terms of the statute and the Arkansas decisions, would be required to pass the tax along to owners. Only contractors with the Government would not be allowed or required to do this. Thus to treat the tax as applicable only to the severer in this case, and the collection provisions affecting the owner as severable and inapplicable, would raise serious questions of discrimination, which neither the Arkansas court nor this court has considered and which appellants are entitled to have determined.

[12] This view is sustained also by the court's expressed view that "Imposition of the tax here does not in any sense interfere with the Government's business." — Ark. —, —, 187 S. W. 2d 7, 12. The statement could mean that the tax would not be applied to the Government as to other owners, in which event a severance of the collection provisions would be implied. That it does not have this meaning is evidenced, I think, by the court's reliance on James v. Dravo Contracting Co., *supra*, where quite different statutory provisions were in question. The court's misapplication of the *Dravo* case was, I think, but a reflection of its implicit idea that the tax would be valid since it was collected immediately from the appellants, even though they might pass on its economic burden to the Government, without regard to how that might be done.

It is true that they have not raised here any question of discriminatory enforcement. But this is because they had no reason to believe that the Arkansas court had applied, or would apply, the statute differently to them than to others or to anticipate the character of the ruling now made. It is doubtful, to say the least, that the Arkansas legislature could place a severance tax exclusively upon persons who sever resources from governmentally owned land. The same doubt would apply to the state court's effort to make the statute so effective, were it to undertake doing this. In my judgment it has not done so. Whether or not such an effort ultimately would be successful, appellants are entitled to be heard upon the question before that result is achieved. They should not be deprived of this opportunity through this Court's upholding of an ambiguously applicable statute or in advance of a decision by the only court which can remove the ambiguity. Because the Arkansas court has not passed upon applicability or severability of the collection provisions as they affect the owner, and because it has not determined the validity of the tax as applied in the light of such a determination, I think the cause should be remanded to it, so that the former questions may be authoritatively determined before we undertake to decide, upon the wholly speculative basis now presented, whether the tax as applied is valid.